

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(SAJ)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S REPLY IN FURTHER SUPPORT OF ITS
MOTION TO COMPEL DEFENDANT SIMMONS FOODS,
INC. TO DISCLOSE JOINT DEFENSE AGREEMENT**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), respectfully submits this reply in further support of its motion for an order compelling Defendant Simmons Foods, Inc. to disclose any joint defense agreement which it contends is applicable to its claims of privilege in this litigation. [DKT #1232]

1. In what appears to be an effort to divert the Court's attention from the real issue raised by the State's motion, Defendant Simmons Foods, Inc. ("Simmons") spends a considerable portion of its brief responding to an argument the State never made: namely, that the so-called joint defense privilege is not a recognized doctrine. The State has not challenged the existence or vitality of this doctrine.¹

¹ The State referred to the joint defense privilege as a so-called privilege because it is not really a privilege, but rather is a doctrine providing an exception to the rule that disclosure of a privileged communication to a third party waives the privilege. *See, e.g., In re CFS-Related Securities Fraud Litigation*, 223 F.R.D. 631, 634 (N.D. Okla. 2004) ("[T]he joint defense

2. Rather, the State has argued that it is entitled to information from Defendant Simmons that will enable it to assess the applicability of the joint defense privilege being claimed by Defendant Simmons on its privilege log, as is its right under Fed. R. Civ. P. 26(b)(5). Specifically, nowhere in Defendant Simmons' privilege log is there any evidence provided which details or substantiates, *inter alia*, the existence of a joint defense agreement in this litigation, the parties to it, the date of its origin, and its scope of coverage. Therefore, the State has requested that Defendant Simmons disclose to the State a copy of the applicable joint defense agreement. Information contained within this agreement will better enable the State to assess the applicability of the privileges and protections being claimed by Defendant Simmons.

3. In fact, when pressed on the issue of the joint defense agreement, contrary to Defendant Simmons' suggestion in its response, *see* p. 16, counsel for Defendant Simmons did not in correspondence "ma[ke] clear the basis of the [joint defense] privilege claims." *See* State's Motion, Exs. 3 & 4. Rather, Defendant Simmons merely stated that it did not believe the joint defense agreement was relevant, and stated its position that the joint defense agreement itself was privileged. *See* State's Motion, Ex. 4.

4. Notably, nowhere in its response does Defendant Simmons explain why disclosure of the joint defense agreement itself would reveal communications protected by the attorney-client privilege or work product doctrine. "A party resisting discovery based on a claim of privilege has the burden of establishing that the privilege applies." *Carbajal v. Lincoln Benefit Life Company*, 2007 WL 1964073, *3 (D. Colo. July 2, 2007), *citing* *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1984).

doctrine provides only that the privilege is not automatically waived in the case of joint consultations or exchanges of information") (citation omitted).

5. Admittedly, both sides have cited cases supporting their respective positions as to whether a joint defense agreement can itself be privileged or not. The State submits, however, that its cases are the better reasoned. In fact, *United States v. Hsia*, 81 F.Supp.2d 7, 11 fn. 3 (D.D.C. 2000), cited by the State, appropriately criticized two of the primary cases relied upon by Defendant Simmons -- *A.I. Credit Corp.* and *Bicoastal Corp.* -- for their lack of "any analysis" and concluded that "[t]hese decisions do not convince this Court that either the existence or the terms of a JDA are privileged."

6. Simply put, the State is entitled to know details about the existence of a joint defense agreement in this litigation, the parties to it, the date of its origin, and its scope of coverage in order to evaluate Defendant Simmons' joint defense privilege claims. The affidavit provided by counsel for Simmons does not, for example, state with specificity the names of the parties to the joint defense agreement and state whether it is limited to the defendants named in this action. Nor does it state specifically when the joint defense began. Nor does it state whether the joint defense pertains to all matters in this case or just select matters. These are key pieces of information needed to evaluate the applicability of the joint defense privileges being claimed. Accordingly, the joint defense agreement should be produced so the State may discern these details and properly assess the applicability of the joint defense privilege being claimed.

WHEREFORE, this Court should enter an order compelling Defendant Simmons Foods, Inc. to disclose any joint defense agreement which it contends is applicable to its claims of privilege in this litigation.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 2007, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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